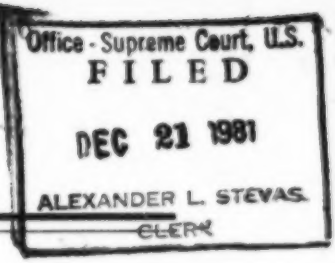
Petition

81-1158



NO. _____

IN THE

Supreme Court of the United States

October Term, 1981

DR. CHARLES McDANIEL, et al.,
Petitioners,

v.

EDWARD HELMS, etc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (UNIT B)*

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

H. PERRY MICHAEL
Senior Assistant
Attorney General

CAROL ATHA COSGROVE
Senior Assistant
Attorney General

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Telephone: 404-656-7063

*Former Fifth Circuit case.

QUESTION PRESENTED

May the administrative hearings which participating States are required to provide in order to receive federal funding under the "Education for All Handicapped Children Act"* be conducted by county and city boards of education at the local level, and by the State Board of Education with respect to state level administrative review of local decisions?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Plaintiff-Appellant

Edward Helms, individually and on behalf of his minor child, Alicia Dawn Helms.

Defendants-Appellees

Dr. Charles McDaniel, individually, and in his official capacity as State Superintendent of Schools of the State of Georgia, and the State Board of Education of the State of Georgia along with its members, individually and in their official capacities, to wit: Roy A. Hendricks, A. J. McClung, Mrs. Saralyn Oberdorfer, James F. Smith, Hollis Lathem, Thomas K. Vann, Jr., Pat G. Kjorlaug, Larry A. Foster, Sr., Asbury Stembridge and Carolyn Huseman.

Dr. Paul Hagerty, individually, and in his official capacity as Superintendent of Bibb County (Georgia) schools, and the Board of Public Instruction and Orphanages of Bibb County, along with its members, individually and

*P.L. 94-142 (20 U.S.C. §§ 1401, *et seq.*)

in their official capacity to wit: L. Tal Day, Ed DeFore, William Hutchings, William K. Lane, R. J. Martin, Buckner F. Melton, Lillian T. Rice, Joseph E. Taylor, Melvin Williams and T. Louie Wood, Jr.

Hearing Officer J. C. Mullis, in his official capacity.

The instant petition to this Honorable Court for issuance of a writ of certiorari is presented on behalf of the *State* defendants-appellees, Dr. Charles McDaniel, *et al.*, and Hearing Officer J. C. Mullis.

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NO. _____

IN THE

Supreme Court of the United States

October Term, 1981

DR. CHARLES McDANIEL, et al.,
Petitioners,

v.

EDWARD HELMS, etc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (UNIT B)*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Unit B) is reported as *Helms v. McDaniel*, 657 F.2d 800 (5th Cir. 1981). Petitioners' motion for rehearing and suggestion for rehearing en banc in light of, *inter alia*, this Honorable Court's decision in *Pennhurst*, were denied by the Court of Appeals on November 9, 1981, without further opinion. The district court's opinion (unreported), the reported opinion of the Court of Appeals, the Court of Appeals' judgment, and its order denying rehearing and en banc reconsideration for all included in the appendix hereto.

*Former Fifth Circuit case

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was rendered and entered on October 2, 1981, with the order of that Court denying petitioners' motion for rehearing and suggestion for rehearing en banc being rendered and entered on November 9, 1981. This petition for a writ of certiorari is filed within ninety days of the Court of Appeals' denial of the motion for rehearing and suggestion of en banc reconsideration. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

20 U.S.C. § 1401:

"As used in this chapter—

* * *

(7) The term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or second schools. . . ."

20 U.S.C. § 1415:

"(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

* * *

(b) (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review."

Ga. Laws 1919, pp. 288, 324, as amended, and in particular as amended by Ga. Laws 1980, p. 1508 Ga. Code Ann. § 32-910):

"(a) Every county, city or other independent board of education shall constitute a tribunal for hearing and determining any matter of local controversy in reference to the construction or administration of the school law, with power to summon witnesses and take testimony if necessary, and when such board has made a decision, it shall be binding on the parties.

(b) Any party aggrieved by a decision of the local board of education rendered on a contested issue after a hearing shall have a right to appeal therefrom to the State Board of Education . . . .

* * *

(f) The procedures provided in subsection (a) through (e) of this section shall not be applicable to handicapped children, when a hearing is necessary to decide a complaint made under the Education for All Handicapped Children Act of 1975. The State Board of Education shall promulgate by rules and regulations an impartial due process procedure for hearing and determining any matter of local controversy in reference to the construction or administration of the school law and an appeals procedure with respect to handicapped children as such term is defined by the State Board of Education. Any tribunal which the State Board of Education shall empower to hear such cases shall have the power to summon witnesses and take testimony as such tribunal deems it necessary. In promulgating such rules and regulations, the State Board of Education shall consult with local boards of education and other local school officials in order to establish procedures required by this subsection which will coordinate to the extent practical, with the administrative practices of such local boards of education."

STATEMENT OF THE CASE

This case raises important questions about the administrative hearing procedures which participating States may use under the "Education for All Handicapped Children Act," P.L. 94-142, 20 U.S.C. § 1401, *et seq.* The State of Georgia, through its State Board of Education, has elected to use what is essentially its traditional mode for the resolution of controversies arising out of the operation of the public schools. This traditional arrangement consists of a hearing before the local (i.e. county or city) board of education sitting as a "school court", with a right of appeal to the State Board of Education which functions as an appellate tribunal. *See* Ga. Laws 1919, pp. 288, 324, as amended through 1977 (Ga. Code Ann. § 32-910(a)-(e)). This procedure, with minor modifications authorized by a 1980 state law amendment (of which more in a moment), has been approved by the Bureau of Education for the Handicapped, the federal administrative agency responsible for acceptance or rejection of state contractual commitments which are required of those States desiring to obtain federal funding under the Act (i.e. the "State Plan"). It is petitioners' position that this long-standing administrative procedure for the resolution of school disputes is indeed *expressly* authorized by the Education for All Handicapped Children Act (EHCA)—either with or without reference to the 1980 state law amendment.

The district court rejected the instant parental challenge of the respondent to Georgia's administrative hearing procedures, finding that as drafted under the 1980 state law amendments, they "comply with the requirements of the federal statutes." Appendix 8b. The Court of Appeals affirmed in part, but also reversed and remanded in part, holding in essence that the "letter of the statute"

(which in so many words authorizes hearings to be conducted by local and State boards of education), was in conflict with the "spirit" of the law; and that what Congress really meant, as disclosed by legislative history, was that "conducted by" means that the school boards should "arrange the hearing at the agency level". *See Helms v. McDaniel*, 657 F.2d 800, 805n.8 (5th Cir. 1981).

The factual setting in which the controversy arose was a dispute over the special educational placement of respondent's daughter, Alicia Dawn Helms. Alicia is undisputedly a "handicapped child" within the meaning of EHCA, having been diagnosed as mildly mentally retarded. In carrying out its *local* level responsibility[1] to see that Alicia is provided with a free appropriate public education as contemplated by EHCA, a special education placement committee of the Bibb County (Georgia) school system, based upon psychological testing, recommended that Alicia be placed in a special education class for mildly retarded students. Alicia's father disagreed, contending that his daughter ought instead to be placed in a normal class with provisions for additional speech and resource teachers.

To resolve this disagreement between the parent and the local school system's placement committee, the committee suggested resort to the administrative hearing procedures available for the handling of such matters. Alicia's father decided to eschew the administrative route. He went directly to the United States District

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[1] The State of Georgia, through its State Board of Education, has elected to participate in this federal funding enactment and hence is bound by its known conditions. The burden of carrying out Georgia's obligations, however, falls chiefly upon the State's counties and cities, which under the State Constitution and laws are vested with the governance, management and control of public schools in Georgia.

Court for the Northern District of Georgia, filing suit on October 29, 1979. The district court's jurisdiction was invoked under EHCA,[2] under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and under 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983 for an alleged deprivation of rights secured by the Constitution and laws of the United States. Respondent named the State and Bibb County boards of education and school superintendents, a hearing officer whom the County Board of Public Instruction and Orphanages had appointed to hear the dispute, and also the Governor of the State of Georgia, as parties defendant. The Governor was dismissed on motion by the district court, with this dismissal not being subsequently appealed by respondent. The complaint alleged in essence that the school boards designated by State law to conduct the hearing and review were not "impartial" triers of fact within the meaning of EHCA. Declaratory and injunctive relief was sought to prevent the Bibb County and State boards of education from sitting as administrative hearing tribunals or acting as decision makers.

While the case was pending, Georgia's *statutory* hearing procedures were amended. *See* Ga. Laws 1980, p. 1508 (eff. July 1, 1980). Prior to the Amendment, the functioning of county and city boards of education as administrative tribunals in Georgia (i.e. for the hearing and adjudication of school controversies, including those arising under EHCA) was directly mandated by State law. *See* Ga.

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[2] *See* 20 U.S.C. § 1415(e). Petitioners consider the existence of jurisdiction under EHCA questionable since on its face it vests district courts solely with the power to review the requisite administrative proceedings which petitioner declined to use. We would question whether use of these procedures, which Congress plainly intended as a condition of judicial review, can be short circuited by resort to 42 U.S.C. § 1983.

Laws 1919, pp. 288, 324, as amended through 1977 (Ga. Code Ann. § 32-910(a)-(e)). The 1980 Amendment placed the power to direct administrative hearing procedures concerning EHCA in the State Board of Education. But while the Amendment gave the State Board flexibility and broad power respecting the establishment of differing hearing procedures for EHCA purposes, the State Board acted cautiously in the exercise of its new authority. It continued the same basic approach with which it was familiar, which is to say a local board adjudication with the right of an appeal to the State Board of Education. Perhaps the most important change involved the use of "hearing officers" at both the local and state levels to take evidence and present proposed findings, conclusions, and recommendations for consideration by the school boards. Prior to the amendment this practice, not unknown in connection with school controversies generally, was strongly recommended by the State Board and in fact routinely used by local school boards in connection with EHCA controversies. The State Board policies promulgated pursuant to the 1980 Amendment made this common practice obligatory. Moreover, while the local board of education remains free under the new policy to either accept or reject the regional hearing officer's proposed findings, conclusions and recommendations, if a local school board in fact rejects the regional hearing officer's recommendation, appeal to the State Board of Education is automatic.

The regional hearing officers used by the local school systems are State trained and approved. They are not "employees" of either the local or State boards of education. On appeal, the State Board of Education normally uses the services of another hearing officer to review the

record, hear argument, and make proposed findings, conclusions and recommendations. This hearing officer too is not an employee of the State or any local board of education. Nor are any of the hearing officers directly involved in the education of handicapped children. As already indicated, these procedures promulgated by the State Board of Education under the 1980 state law amendment were presented to, reviewed by, and approved by the federal administrative agency exercising federal level jurisdiction over EHCA, i.e. the Bureau of Education for the Handicapped.

Both sides stipulated that the action be tried in the district court on the basis of pleadings, exhibits, memoranda of law and cross motions for summary judgment. The district court entered its judgment on December 31, 1980, denying plaintiff's motion and granting the summary judgment motions filed by the State and Bibb County defendants. *See* Appendix "B". Alicia's father filed a timely appeal and the former United States Court of Appeals for the Fifth Circuit (now the Eleventh Circuit) rendered its decision, which reversed and remanded the district court in part, on October 2, 1981. Petitioner's motion for rehearing and suggestion for rehearing en banc were denied on November 9, 1981. *See* Appendix "D".

REASONS FOR GRANTING THE WRIT

The Court of Appeals has by judicial construction added the word "not" to the statutory "shall", thus bringing about a 180° shift in the authority of participating states to use school boards as hearing tribunals in "Education for All Handicapped Children Act" controversies. While the error of resorting to legislative history to judicially

alter statutory language clear and unequivocal on its face might not ordinarily be an error worthy of Supreme Court consideration and correction, it is here for two reasons. The first is that the decision's impact is detrimental to fiscal responsibility on the part of those governmental bodies which are directly responsible for State and local level implementation of the Act. The second is that the error causes the decision below to be in conflict with the federal funding enactment standards which this Court enunciated in *Pennhurst*.

(1) **The error below**

About as well settled as any rule of law is the proposition that where clear and unequivocal statutory language is capable of being applied as written, it is the duty of a court to do so—resort to legislative history or legislative intent in order to *judicially* add to, subtract from or otherwise alter or amend the plain language of the legislature being inappropriate. *See*, e.g. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976); *United States v. Oregon*, 366 U.S. 643, 648 (1961); *United States v. Public Utilities Commission of California*, 345 U.S. 295, 315 (1953); *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485, 492 (1947); *Accord, Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979); *Beal v. Doe*, 432 U.S. 438, 444 (1977); *see also* 82 C.J.S. *Statutes* § 322, pp. 577, et seq. (citing many decisions).

In the present situation, EHCA's authorization for States to continue their customary practice of having school boards sit as administrative tribunals for the resolution of school controversies *for EHCA purposes*, is about as plain and unambiguous as the language will allow. The

"hearing" section of the Act (20 U.S.C. § 1415) states on its face that:

> "Whenever a complaint has been received . . . , the parents or guardian shall have an opportunity for an impartial due process hearing *which shall be conducted by the State educational agency or by the local educational agency or intermediate education unit, as determined by State law or by the State educational agency*" [20 U.S.C. § 1415(b)(a)] (emphasis added),

and further provides that *if*, pursuant to state law, the initial hearing "is conducted by a local educational agency," a party aggrieved by its decision:

> ". . . may appeal to the State educational agency *which shall conduct an impartial review* of such hearing." [20 U.S.C. § 1415(c)] (emphasis added).

To remove all doubt as to what "educational agency" means, EHCA defines "State educational agency" as a "State board of education" and "local educational agency" as a "public board of education" functioning at the county, city or other local political subdivision level. *See* 20 U.S.C. § 1401(7)(8).

Certainly there is no inherent lack of impartiality in having school boards perform their traditional function of sitting as administrative courts respecting school controversies. *See Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482 (1976); *Jenkins v. Louisiana State Board of Education*, 506 F.2d 992, 1003 (5th Cir. 1975). Dealing with controversies over pupil placement and curriculum, such as give rise to the instant litigation, are matters about which school boards are quite familiar. Use of their expertise in such matters is scarcely hostile to the overall purpose of EHCA, which is to encourage states to make appropriate educational services available for handicapped children, but rather

effectively furthers it. There is, in other words, no overriding purpose of the Act which could be said to justify resort to "legislative history" in order to alter the words the Congress actually used:

> "shall be conducted by" [20 U.S.C. §§ 1415(b)(2) and 1415(c)],

a full 180° (by *judicial* insertion of the word "not") to end up with a statute reading:

> "shall *not* be conducted by" [*see* 657 F.2d at pp. 805, 806n.9]

If the Congress indeed intended for its words to mean precisely the opposite of what they say, as the decision below plainly holds, we would respectfully suggest that the proper place for the Congress to have expressed this intendment was in the body of the Act itself, not in a Senate Conference Report. *See* S.Conf.R. No. 94-455, 94th Cong. 1st Sess. 48-49; 1975 U.S. Code Cong. & Admin. News 1480, 1502.

(2) **The Court of Appeals' decision seriously impairs the ability of those State and local governmental bodies responsible for the implementation and administration of EHCA to do so in a fiscally responsible manner.**

When it comes to the overall purpose of EHCA, it is, we respectfully submit, the judicial amendment of 20 U.S.C. § 1415, adding the word "not" to completely reverse its direction, which poses the greater threat to achievement of the goal. Surely one of the quickest ways of killing a federal funding enactment would be its fiscally irresponsible administration. If the Act is to work it must be administered in a fiscally responsible manner at *all* levels of government. Dollars for education are not unlimited at the local, State or federal level. While school

boards are obligated to see that handicapped children, and indeed all children, receive some form of appropriate education, they also bear a responsibility to see that school funds, including those available for the education of handicapped children, are spent in the most efficient manner possible. Where a number of alternative "appropriate" modalities of education exist to meet a handicapped child's needs, fiscal responsibility will often (one hopes) dictate selection of other than that which is the most expensive (which precisely because it is the most expensive might be deemed by some to be the "best" of the alternative "appropriate" vehicles). To divest school boards of their right, responsibility, and need to make the final *administrative* decision in controversies under EHCA, when it is these very school boards which are fiscally responsible for whatever results in the way of an appropriate educational program, ought to be unthinkable. It confuses their obligation to function as an impartial trier of fact concerning whether and what kind of special education services a child may need (and no evidence has been presented in this case as to any inability of a school board to function impartially here) with their quite different fiscal responsibility obligation to be cost conscious when it comes to *which* "adequate" educational program (when multiple programs are available) should be selected for a given handicapped child. In the latter situation one would certainly hope that they are *not* impartial, and that they consciously favor the least rather than most expensive approach to getting the job done. The adverse impact of the Opinion of the Court of Appeals upon State and local ability to administer EHCA in a fiscally responsible manner is, we respectfully submit, obvious. Moreover, the matter is one of national import since Georgia is scarcely alone among the states in its

belief that it is of no small importance to have the final *administrative* decision under EHCA made by the board, agency or official bearing funding responsibility. For this reason the error of the Court of Appeals is one which merits review and correction by the Supreme Court of the United States.

(3) **The Court of Appeals decision conflicts with the standards of measurement for State compliance with federal funding enactments which this Honorable Court recently enunciated in *Pennhurst*.**

The Court of Appeals' opinion suggests that its resort to "legislative history" and its ensuing construction of the statute to mean the opposite of what it seemingly says is appropriate because some "ambiguity" (unspecified) exists. Assuming *arguendo* that there really is any ambiguity so as to make resort to legislative history appropriate, under the authority of this Honorable Court's recent decision in *Pennhurst State School and Hospital v. Halderman*, ___ U.S. ___, 67 L.Ed.2d 694 (April 20, 1981), this very ambiguity in and of itself should have resulted in affirmance of the district court's decision in Petitioner's favor. It has been judicially recognized that EHCA "is a funding statute to assist states in providing a free appropriate education to all handicapped children . . . ." *Georgia Association of Retarded Citizens v. McDaniel*, 511 F.Supp. 1263, 1267 (N.D. Ga. 1981). Under *Pennhurst* it is clear that:

> "The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'. *** There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on

> the grant of federal monies, it must do so unambiguously." 67 L.Ed.2d at 707.

Georgia, relying on what it views as the express statutory authorization of EHCA to have its State Board of Education conduct an impartial review of hearings which are conducted by and decided by local county and city school boards, has agreed to this and no more in its contract (i.e. State Plan) submitted to *and in fact approved by the federal agency having administrative jurisdiction over EHCA*. It has not agreed to the governmental fiscal irresponsibility of divesting its State Board of Education, ultimately responsible for the funding of public education under EHCA, from the power to make the final *administrative* decision in a disagreement about which of various appropriate educational programs (of differing cost) should be selected for a given child. If, as the opinion below suggests, vagueness or ambiguity does exist to preclude application of 20 U.S.C. § 1415 as written, Georgia's obligation, under *Pennhurst*, is limited to its contractual undertaking (i.e. its current hearing procedures as outlined in its "State Plan"), and the district court's decision should have been affirmed on this basis. This error is worthy of Supreme Court review both because it places the Court of Appeals' decision in conflict with *Pennhurst* and because of its adverse impact on governmental fiscal responsibility.

CONCLUSION

For all of the reasons stated the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit (Unit B) should be granted and the decision below reversed by this Honorable Court.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant Attorney General

H. PERRY MICHAEL
Senior Assistant Attorney General

CAROL ATHA COSGROVE
Senior Assistant Attorney General

ALFRED L. EVANS, JR.
Senior Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Telephone: 404-656-7063

APPENDICES

APPENDIX A

OPINION OF THE COURT OF APPEALS

Edward HELMS, Individually and on behalf of his minor child, Alice Dawn Helms, Plaintiffs-Appellants,

v.

Dr. Charles McDANIEL, Individually and in his official capacity as Superintendent of the Georgia State Board of Education, et al., Defendants-Appellees.

No. 81-7111
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Oct. 2, 1981.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

VANCE, Circuit Judge:

This case involves a challenge to the procedures by which the state of Georgia has attempted to comply with the requirements of the Education for All Handicapped Children Act (EHA), 20 U.S.C. §§ 1401 et seq., and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Both parties stipulated that the action be tried on the basis of pleadings, exhibits and memoranda of law and filed motions for summary judgment. The district court denied plaintiffs' motion and awarded summary judgment to defendants.

Our discussion focuses upon the provisions of the EHA since compliance with the detailed prescriptions of that statute satisfies section 504 as well. 34 C.F.R. § 104.36. Before determining whether the hearings afforded parents and students by the state of Georgia comport with the requirements of the Act, it is useful to review briefly the role of these hearings in the statutory scheme.

The EHA established a program of federal assistance to the states to assist them in educating handicapped children. Receipt of federal funds was conditioned upon provision of "a free appropriate public education" to all handicapped children.

Congress did not attempt to define an appropriate education for children with a vast variety of handicaps. Instead, Congress recognized that each handicapped child faces unique difficulties demanding unique solutions. Congress thus decided that an appropriate education should be defined individually with each child. This definition is embodied in the child's Individualized Education Program (IEP), a document developed by parents and educators which states, among other things, the objectives of the child's program and the services which will achieve them. 20 U.S.C. § 1401(18) & (19).

To insure that the IEP would in fact provide an appropriate education, Congress created a detailed system of procedural safeguards through which parents and children could enforce their rights under the Act.[1] These safeguards include the right to an "impartial due process hearing" when parents are dissatisfied with their child's IEP. 20

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[1] For a discussion of the procedures provided by the EHA and their role in obtaining congressional objectives, see Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv.L.Rev. 1103 (1979).

U.S.C. § 1415(b)(2).[2] These hearings are to be conducted by the state or local educational agency responsible for providing services. However, no employee of an agency involved in the education or care of the child may conduct the hearing. *Id.* The congressional Conference Committee Report makes clear that "any hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer since the State or local agency or intermediate unit will be party to any complaint presented." S.Conf.R. No. 94-455, 94th Cong., 1st Sess. 49 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad.News 1425, 1480, 1502.[3]

[2] 20 U.S.C. § 1415(b)(2) provides:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

[3] The relevant section of the legislative history reads in full:

> (7) The provisions of existing law are clarified and strengthened with respect to impartial due process hearings and language is adopted to assure that:
>
> (a) any parent or guardian may present a complaint concerning *any matter* regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child.
>
> (b) whenever a complaint is received the parents or guardian shall be afforded an opportunity for an impartial due process hearing, which shall be conducted by the local educational agency or the State educational agency. The conferees do not intend that this provision will require changes in existing arrangements where due process hearings are conducted at the level of the State educational agency rather than at the local level. The only requirement with respect to the level of which such hearings are conducted occurs when the hearing is conducted at the local level and in such cases there is a review required at the State agency level. In addition, the conferees point out that any hearings are not conducted by the agency

Whether the due process hearing is provided by the state or local educational agency is left to the discretion of the states. However, if the initial hearing is held at the local level, either party may appeal "to the State educational agency which shall conduct an impartial review of such hearing." 20 U.S.C. § 1415(c).[4] The Act provides that "[t]he officer conducting such review shall make an independent decision upon completion of such review." *Id.* The decision of the initial hearing officer is final unless appealed; the decision of the state officer is likewise final unless either party brings an action in state court or federal district court. 20 U.S.C. § 1415(e)(1).[5]

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itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer since the State or local agency or intermediate unit will be a party to any complaint presented.

(c) no hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing;

. . . .

S.Conf.R. No. 94–455, 94th Cong., 1st Sess. 48–49 (1975), *reprinted in* [1975] U.S.Code Cong. & Ad.News 1480, 1502 (emphasis in original).

[4] 20 U.S.C. § 1415(c) provides:

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

[5] 20 U.S.C. § 1415(e)(1) provides:

A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

Bearing in mind the requirements of the Act and the congressional emphasis upon procedureal safeguards in enforcing the right to an appropriate education, we turn to the hearing procedures provided by the state of Georgia.

These procedures have undergone repeated change. Under regulations promulgated in 1978, Georgia utilized a single tier system. The due process hearing was conducted by a state-appointed regional hearing officer with appeal directly to the courts. In an opinion issued January 5, 1979, however, the Georgia Attorney General cast doubt on the validity of this framework. The Attorney General stated that hearings under the EHA were controlled by Ga.Code § 32-910 which identifies the procedures to be used in school controversies generally.[6]

As a result of this opinion, the Georgia hearing proce-

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[6] Ga.Code § 32-910 reads in pertinent part:

(a) Every county, city or other independent board of education shall constitute a tribunal for hearing and determining any matter of local controversy in reference to the construction or administration of the school law, with power to summon witnesses and take testimony if necessary, and when such board has made a decision, it shall be binding on the parties.

(b) Any party aggrieved by a decision of the local board of education rendered on a contested issue after a hearing shall have the right to appeal therefrom to the State Board of Education. The appeal shall be in writing and shall distinctly set forth the question in dispute, the decision of the local board, a concise statement of the reasons why the decision below is complained of, and the party taking the appeal shall also file with the appeal a transcript of testimony as true and correct by the local superintendent. The appeal shall be filed with the local superintendent within 30 days of the decision of the local board, and within 10 days thereafter, it shall be the duty of the local superintendent to transmit a copy of the appeal together with the transcript of evidence and proceedings, the decision of the board, and other matters in the file relating to the appeal, to the State Board of Education. The State Board of Education shall adopt regulations governing the procedure for hearings before the local board and proceedings before it.

dures were altered to conform to section 32-910. EHA hearings were now held at the local level with the right to appeal to the state board of education. The local board could either itself sit in judgment at the hearing or appoint a hearing officer. If a hearing officer were appointed, his findings were treated as those of a special master subject to approval or rejection by the local board. A similar procedure occurred at the state level: if the state board appointed a hearing officer to conduct the review, his findings too were treated as those of a special master with the power of final decision resting in the board. The procedures had taken this form at the time this suit was instituted.

Before a final decision was rendered, however, they underwent further changes. In response to complaints about the new system, the Office for Civil Rights expressed concern that the procedures did not provide the impartial hearing demanded by federal law. In part as a result of these concerns, the Georgia legislature amended section 32-910 in 1980 to exclude complaints brought under the EHA from the coverage of that statute.[7] As a

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[7] The amendment is codified at § 32-910(f):

> (f) The procedures provided in subsections (a) through (e) of this section shall not be applicable to handicapped children, when a hearing is necessary to decide a complaint made under the Education for All Handicapped Children Act of 1975. The State Board of Education shall promulgate by rules and regulations an impartial due process procedure for hearing and determining any matter of local controversy in reference to the construction or administration of the school law and an appeals procedure with respect to handicapped children as such term is defined by the State Board of Education. Any tribunal which the State Board of Education shall empower to hear such cases shall have the power to summon witnesses and take testimony as such tribunal deems it necessary. In promulgating such rules and regulations, the State Board of Education shall consult with local boards of education and other local school officials in order to establish

consequence of this amendment, local boards are now required to appoint a hearing officer to conduct the due process hearing. His findings are still subject to approval by the local board. If the board rejects his conclusions, appeal to the state level is automatic. Findings by the state officer are similarly subject to approval by the state board. The decision of the state board is final with no automatic appeal in the event that the officer's findings are rejected.

By amending section 32-910, the Georgia legislature has avoided conflict between the federal and state statutes. In applying the provisions of the EHA to Georgia administrative practices, however, certain deficiencies are apparent.

[1-3] At the local level, the practice of treating the findings of the hearing officer as the report of a special master poses a formal conflict with federal law. The statute guarantees aggrieved parties an impartial hearing and accordingly prohibits employees of the state agency from conducting the hearings. In addition, the portion of the legislative history quoted above indicates that the educational agency itself may not conduct hearings since it will often be a party to the proceedings. It is thus clear that members of the local board may not conduct hearings.[8]

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procedures required by this subsection which will coordinate to the extent practical, with the administrative practices of such local boards of education.

Appellants question the extent to which the amendment to Ga. Code, § 32-910 has altered Georgia procedures. Our statement of the law today is the same regardless of the precise impact of the amendment on Georgia practices.

[8] Defendants argue that 20 U.S.C. § 1415(b)(2) authorizes the procedures they have adopted. The legislative history makes clear, however, that the authorization of state agencies to "conduct" the due process hearing means that the agency should arrange the hearing and that it should be conducted at the agency level. Contrary to the

See Campochiaro v. Califano, Civ. No. H-78-64 (D.Conn. 1978) (finding probability that plaintiffs would prevail in their contention that local board members may not conduct due process hearing); *cf. Robert M. v. Benton*, 634 F.2d 1139 (8th Cir. 1980) (holding that Superintendent of Public Instruction may not conduct due process hearing). To appoint an officer to conduct the hearing but then to treat his report only as a recommendation violates the Act's requirement that the decision of the hearing officer be final unless appealed. *See Monahan v. Nebraska*, 645 F.2d 592 (8th Cir. 1981) (finding that plaintiff had shown probability of success on the merits in challenging scheme permitting Commission of Education to accept or reject decision of due process hearing).

[4] If we look to the substance of the local procedures, however, they may be said to comply substantially with the requirements of the EHA. Since a rejection of the

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position of the defendants we do not find a clear and unambiguous statement in the statute to the contrary. Even were the statutory language less ambiguous than it is, we would still find defendants' position unacceptable, as being in sharp conflict with the entire structure of the EHA.

> "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." . . . Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will . . . . "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

Philbrook v. Glodgett, 421 U.S. 707, 713–14, 95 S.Ct. 1893, 1898–1899, 44 L.Ed.2d 525 (1975) (citations omitted). Defendants' citation to *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976) does not bear on this issue. That case holds only that a board of education may act as an arbiter in some kinds of cases without violating constitutional standards of due process. It in no way speaks to cases brought under the EHA. Our holding today is based not upon constitutional grounds but upon our interpretation of the statute.

officer's findings results in an automatic appeal, it is in effect only a decision to appeal. Conversely, an acceptance of his findings leaves his decision as final unless the other party chooses to appeal. We are reluctant to interfere with Georgia's administrative terminology. So long as it is recognized that the choice before the local board is simply whether or not to appeal the decision of the impartial hearing officer, and that the burden of proof and standard of review on appeal are unaffected by this structural arrangement, we hold that the current procedures for holding local due process hearings do not violate the EHA or section 504.

[5] The state review procedures, on the other hand, conflict with federal law both formally and substantively. In treating the findings of the state reviewing officer as the findings of a special master, the state board fails to comply with the requirement that this decision be final unless appealed to state or federal court. Nor can the discretion vested in the state board be interpreted merely as the power to decide whether to appeal. The decision of the state board is final. If it rejects the findings of the reviewing officer, the burden is upon the aggrieved party to pursue his complaint in court. This system not only contravenes the specific requirement of finality: it undermines the enforcement structure created by the Act. The EHA provides that the goal of an appropriate education will be achieved through conference and hearings. To safeguard the right to an appropriate education, Congress made unmistakeably clear that the hearings provided by the Act were to be impartial and result in final decisions. If a state board may, at its discretion, reject the results of this process, the entire system of procedural safeguards is nullified at a single stroke. After considerable time and

expense, the state or federal court will be forced to become the guardian of rights which should be protected in the first instance by the administrative processes mandated by the EHA. As one state court has stated in a similar case, "[I]t is the intent of Congress that a party having gone through the administrative hearing processes before the local agency and the [state agency] shall be entitled to a final decision, subject only to a court appeal." *In the Matter of the "A" Family*, 602 P.2d 157, 167 (Mont.1979).[9]

[6, 7] We thus hold that the state review procedures are inconsistent with the requirements of the EHA and section 504.[10] Accordingly, we affirm the award of summary

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[9] It is clear also that the state board could not itself conduct the review. As the legislative history indicates, the impartiality demanded in the review proceeding cannot be achieved when the educational agency or one of its employees is in charge of the proceeding. *See Vogel v. School Board*, 491 F.Supp. 989, 994–95 (S.D.Mo. 1980) (holding employee of state board not an impartial hearing officer pursuant to 20 U.S.C. § 1415(c)).

[10] We deal briefly with two other points. In the court below the state defendants argued they were immune from suit under the eleventh amendment. The court did not reach this issue. We have, of course, the authority to affirm on grounds other than those relied on by the district court. There is, however, no basis for doing so in this case. The law has been clear for decades that the eleventh amendment does not bar a federal court from enjoining state officials to conform their future conduct to the requirements of federal law. *See Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

The lower court found a private right of action under section 504 on the authority of *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980). *Camenisch* has since been vacated as moot. *University of Texas v. Camenisch*, ___ U.S. ___, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). In vacating, however, the Supreme Court did not question the correctness of this court's holding on the private right of action issue, and indeed ordered the case remanded to the district court for a judgment on the merits. We conclude that this aspect of *Camenisch* is still good law in this circuit. *Cf. Brown v. Sibley*, 650 F.2d 760, 767 n.9 (5th Cir. 1981) ("We therefore are disposed, for the limited purpose of our disposition in this case, to assume the existence of such a right [of private cause of action under § 504]").

judgment to defendants as to the local procedures and reverse and remand for award of summary judgment to plaintiffs as to the state review procedures.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX B

ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed in Clerk's Office, U.S.D.C.—Atlanta, December 30, 1980, Ben H. Carter, Clerk; By: M. J. Watson, Deputy Clerk.]

EDWARD HELMS, Individually and on behalf of his minor child, ALICIA DAWN HELMS, *Plaintiffs,* v. DR. CHARLES McDANIEL, et al., *Defendants.*	CIVIL ACTION C79-2016A

ORDER

Presently before the Court are cross motions for summary judgment filed by all the parties to this action. Plaintiffs seek declaratory and injunctive relief, contending that defendants are in violation of The Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, The Education of All Handicapped Children Act, 20 U.S.C. §1401, et seq., the regulations promulgated pursuant to those acts and 42 U.S.C. §1983.

The Education of All Handicapped Children Act provides federal financial assistance to the states for education of the handicapped. Any state or local educational agency which receives assistance under the act is required to establish and maintain procedures in accordance with 20 U.S.C. §1415(b) through (e) and the regulations promulgated pursuant to that statute, 45 C.F.R. §121a.500,

et seq., "to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education . . ." 20 U.S.C. §1415(a). Under the required procedures the parents or guardian of a handicapped child must have the opportunity to present any complaint with respect to the identification, evaluation or educational placement of the child. The required procedures must assure the parents or guardian the opportunity for an impartial due process hearing and the opportunity for administrative and judicial review. The procedures must also provide for certain specified procedural safeguards.

Defendants have established a set of due process procedures as required by The Education of All Handicapped Children Act, and it is that set of procedures (hereinafter referred to as "defendants' due process procedures") which plaintiffs challenge. Plaintiffs contend that defendants' due process procedures fail to comply with The Education of All Handicapped Children Act and the regulations promulgated pursuant to that act.

Plaintiffs additionally contend that defendants' due process procedures fail to comply with The Rehabilitation Act of 1973 and the regulations promulgated pursuant to that act. The Rehabilitation Act of 1973 provides that programs receiving federal financial assistance shall not discriminate on the basis of handicap. The regulations which implement the act require a recipient of federal funds which operates a public elementary education program to establish certain procedural safeguards with respect to educational placement of handicapped children. Compliance with the procedural safeguards required by The Education of All Handicapped Children Act is a means of meeting the procedural safeguards requirement

of The Rehabilitation Act regulations. 45 C.F.R. §84.36.

The parties to this action have stipulated that the action be tried by the Court on the basis of the pleadings, memoranda of law and exhibits submitted. The parties have expressly waived the right to trial by jury, notwithstanding the demand for a jury trial previously filed. The Court directed the parties to submit a joint stipulation of the facts as to which they agree there is no issue to be tried. The Court is being asked to base its decision in this action on the following statement of facts.

The Board of Public Instruction and Orphanages of Bibb County and its members have the responsibility under federal law to provide a free appropriate program of special education to every child of school age determined to be handicapped and in need of special education. Alicia Dawn Helms is nine years old. She lives with her parents in Bibb County, Georgia. Alicia is a handicapped child in need of special education as defined by The Education of All Handicapped Children Act, and plaintiffs are entitled to the protection of the procedural safeguards afforded by that act and by The Rehabilitation Act of 1973.

Alicia was recommended for placement in a self-contained learning disability class in August of 1977. Her parents refused this placement and enrolled her in a regular first grade class. Due to her extreme inability to function in that setting, her parents consented to placing her in the self-contained learning disability class in November of 1977. At the beginning of the 1978-1979 school year, the Bibb County Special Education Placement Committee recommended that Alicia again be placed in a self-contained class for children with learning disabilities. Alicia's parents objected, and Alicia was placed in a

regular classroom with special resource assistance one hour per day.

In May of 1979 Alicia was tested by a psychologist. On the basis of the test results the Special Education Placement Committee recommended that Alicia be placed in a self-contained class in an area of mild mental retardation. Alicia's parents objected to that placement, and the Placement Committee invoked the hearing procedure afforded by federal law for resolution of differences between a school system and parents or guardian of a handicapped child. This lawsuit was filed before the due process hearing provided for by federal law was held. Defendants in this action have stipulated that Alicia may remain in her present placement pending the outcome of this litigation.

Defendants have challenged this Court's jurisdiction over this action, contending that there is no private right of action under The Education of All Handicapped Children Act or The Rehabilitation Act of 1973 and further contending that plaintiffs' failure to exhaust administrative remedies precludes any action in this Court. It has been held there is no private right of action for damages under The Education of All Handicapped Children Act. *Loughran v. Flanders*, 470 F.Supp. 110 (D. Conn. 1979). This Court does not find, however, that plaintiffs may not bring an action for declaratory and injunctive relief for an alleged violation of the act. Additionally, plaintiffs do have a private right of action to enforce The Rehabilitation Act of 1973 through injunctive relief. *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980).

The Court of Appeals for the Fifth Circuit has recently held that private individual suits to enforce rights provided by The Rehabilitation Act of 1973 may be brought

without prior resort to federal administrative remedies. *Camenisch v. University of Texas, supra.* The Fifth Circuit found that the administrative remedies provided under that act are not relevant to a private action for injunctive relief. As to the administrative remedies provided at the state and local level under The Education of All Handicapped Children Act, plaintiffs contend that exhaustion would be futile since it is the administrative remedies themselves which they challenge. This Court will consider plaintiffs' challenge to defendants' due process procedures without first requiring exhaustion of those administrative remedies.

Plaintiffs challenge defendants' due process procedures in the following respects:

1. Plaintiffs contend the procedures fail to provide an impartial due process hearing before an impartial hearing officer.

2. Plaintiffs contend the procedures fail to provide the opportunity for a handicapped child's parents or guardian to present their case before the trier of fact.

3. Plaintiffs contend the procedures fail to provide who has the burden of proof at the local or state hearings.

4. Plaintiffs contend the procedures fail to provide the standard of review of a hearing officer's decision to be used by a local board of education.

As to the first two challenges, The Education for All Handicapped Children Act requires an impartial due process hearing, before an impartial hearing officer, at which a handicapped child's parents or guardian may present their case. The due process procedures established by defendants are absolutely consistent with these requirements. Federal law, however, provides that the

decision of the hearing officer is to be final subject to appeal to the State Board of Education, and defendants' procedures provide for the local board of education to adopt or reject, without a hearing, the hearing officer's "recommendation" and to issue its "final" decision. Plaintiff's position is that this makes the local board of education the trier of fact and final decision maker. The local board of education is not "impartial" as that term is defined in 20 U.S.C. §1415(b)(2) and 45 C.F.R. §121a.507 (a), and a handicapped child's parents or guardian do not present their case before it.

This Court finds that a local board of education's adoption or rejection of a hearing officer's recommendation does not make that board the trier of fact. Under defendants' due process procedures either party may appeal the decision at the local level, and an appeal is automatic when the hearing officer's recommendation has been rejected. Defendants' procedures clearly provide that on appeal the State Board of Education must review the entire hearing record. Defendants' due process procedures do not provide for the State Board of Education to review the decision of the local board of education.

An intermediate step—approval or disapproval of the hearing officer's decision—is a part of defendants' due process procedures, but it is the decision of the impartial hearing officer, before whom the handicapped child's case was presented, which is made subject to review by the State Board of Education. The practical result is the same as if the intermediate step were omitted. The practice does not violate any rights of a handicapped child or the parents or guardian of a handicapped child, and it is not prohibited by federal law.

Plaintiffs assert an additional ground for their conten-

tion that local boards of education act as triers of fact and final decision makers. Such was the practice under Ga. Code Ann. §32-910, and plaintiffs contend that defendants continue to act pursuant to that statute in cases such as the present one despite the recent amendment which makes it inapplicable in the case of a handicapped child for whom a hearing is required under The Education of All Handicapped Children Act. While there may be merit to plaintiffs' contention, there are no facts before the Court at this time which support it. If plaintiffs later seek judicial review in this Court of an adverse determination under defendants' due process procedures, they will then have the opportunity to show that defendants acted pursuant to Ga. Code Ann. §32-910 despite the recent amendment making the statute inapplicable to a case such as this one.

The failure of defendants' procedures to specify who has the burden of proof at the local or state hearings does not violate the requirements of the regulations promulgated pursuant to The Education of All Handicapped Children Act, even assuming the regulations place the burden of proof upon the local educational agency as plaintiffs contend. The Court will assume defendants comply with the requirements of federal law as to the burden of proof, even if their procedures do not specify who has the burden of proof, unless facts to the contrary are presented. If plaintiffs seek judicial review of any adverse determination under defendants' due process procedures, they may be able to show at that time that defendants improperly assigned the burden of proof.

The failure of defendants to set forth the standard of review of a hearing officer's decision to be used by a local board of education does not violate the requirements of

The Education of All Handicapped Children Act. On appeal the State Board of Education reviews the decision of the hearing officer and not the decision of the local board of education. Accordingly, plaintiffs' contention that there can be no effective review of the action of the local board of education is meaningless.

Plaintiffs contend that interpretations of Georgia law by the State Attorney General, federal agency challenges to defendants' due process procedures and the results of application of defendants' due process procedures indicate that defendants are in violation of The Education of All Handicapped Children Act, The Rehabilitation Act of 1973 and the regulations promulgated pursuant to those acts. There are no facts before the Court which support these contentions, however.

CONCLUSION

On the basis of the facts before it, the Court does not find that defendants are in violation of The Education of All Handicapped Children Act, The Rehabilitation Act of 1973 or the regulations promulgated pursuant to those acts. Accordingly, plaintiffs' claim under 42 U.S.C. §1983 also fails. Defendants' due process procedures, as drafted, comply with the requirements of the federal statutes. Ga. Code Ann. §32-910 has been amended so that it is inapplicable to cases which require hearings under The Education of All Handicapped Children Act, and there are no facts before the Court which suggest that defendants continue to act pursuant to Ga. Code Ann. §32-910 in such cases. Finally, there are no facts before the Court which suggest that defendants' due process procedures are being applied in such a way that they violate federal law. In view of

these conclusions, the Court finds it unnecessary to consider the state defendants' Eleventh Amendment defense.

In summary, plaintiffs' motion for summary judgment in this action is DENIED. Defendants' motions for summary judgment are GRANTED. These rulings are, however, without prejudice to plaintiffs' right to pursue the remedies afforded them by defendants' due process procedures, to seek judicial review in this Court of any adverse determination as provided in 20 U.S.C. §1415(e) and to challenge defendants' due process procedures, as applied to them, at that time. During the pendency of such proceedings Alicia Dawn Helms will remain in her present educational placement unless the parties agree otherwise. 20 U.S.C. §1415(e)(3).

IT IS SO ORDERED, this 30th day of December, 1980.

/s/ M. H. Shoob

Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-7111
Non-Argument Calendar

D.C. Docket No. CV-79-2016A

EDWARD HELMS, Individually and on behalf of his minor child, ALICE DAWN HELMS,
Plaintiff-Appellants,

versus

DR. CHARLES McDANIEL, Individually and in his official capacity as Superintendent of the Georgia State Board of Education, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia and was taken under submission by the Court upon the record and briefs on file pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is

hereby, affirmed in part; reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay the costs on appeal to be taxed by the Clerk of this Court.

October 02, 1981

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

UNIT B

[U.S. Court of Appeals, Eleventh Circuit,
Filed Nov. 9, 1981, Norman E. Zoller, Clerk.]

NO. 81-7111

EDWARD HELMS, Individually and on behalf of his minor child, ALICE DAWN HELMS,
Plaintiffs-Appellants,

versus

DR. CHARLES McDANIEL, Individually and in his official capacity as Superintendent of the Georgia State Board of Education, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 2, 1981, 5 Cir., 198__, ____ F.2d ____).
(Nov. 09, 1981)

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452—October 14, 1980)

Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT S. VANCE
United States Circuit Judge